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DAC

PATENT
MATTER NO. 1703941

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent no. 4,407,288, of: 061243801

ALOIS A. LANGER, et. al.

Petitions Examiner K. Creasy

Issue Date: October 4, 1983

For: IMPLANTABLE HEART STIMU-
LATOR AND STIMULATION
METHOD

FOLLOW-UP RESPONSE TO THE NOTICE OF NON-ACCEPTANCE
OF FEE DEFICIENCIES

Box DAC
Assistant Commissioner for Patents
Washington, D.C. 20231

Greetings:

In further response to the Notice mailed August 6, 1998, petitioner notes that the Federal Circuit Court of Appeals has now decided the *DH Technologies* case relied on by the Office in petitioner's favor. A true copy of the case decision, of September 1, 1998, is enclosed: it holds that correction of fee payments is to occur solely under 37 CFR 1.28, not any of the other provisions of the statute and rules.

Because of the pressure of pending litigation, *CPI v. Intermedics* and *Intermedics v. CPI*, in the federal district court in Minnesota, petitioner again asks immediate substantive action on its March 9, 1998, submission of the fee difference between small entity and large entity for the first two maintenance fees due. *Jewish Hospital of St. Louis v. Idexx Laboratories*, relied on by petitioner, was correctly decided.

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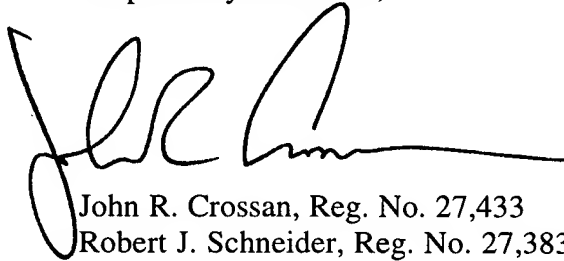
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CONCLUSION:

Prompt and favorable action in reconsidering and withdrawing the August 6 Notice and in now formally accepting the maintenance fees proffered are respectfully requested. If a telephone conference may resolve any questions, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JRC', followed by a long horizontal line.

John R. Crossan, Reg. No. 27,433

Robert J. Schneider, Reg. No. 27,383

October 9, 1998

CHAPMAN AND CUTLER
111 W. Monroe Street
Chicago, Illinois 60603
(312) 845-3420

U.S. Court of Appeals
Federal Circuit

DH Technology Inc. v. Synergystex
International Inc.

Nos. 97-1128, -1280, -1453

Decided September 1, 1998

PATENTS

1. Practice and procedure in Patent and
Trademark Office — Fees (§110.03)

Sole provision governing time for correction of erroneous payment of issue fee as small entity is 37 CFR 1.28, which specifically addresses correction of erroneous claim of small entity status and erroneous payment of small entity issue fee; Section 1.28(c)(2) permits patentee to correct erroneous payment of small entity issue fee at any time, provided payment of amount owing is accompanied by statement explaining how error in good faith occurred and when error was discovered, and while Section 1.28 does not limit time during which honest error may be corrected, it prevents attempts to fraudulently pay small entity issue fee while maintaining enforceable patent.

JUDICIAL PRACTICE AND
PROCEDURE

2. Procedure — Contempt; sanctions
(§410.49)

Federal district court did not abuse its discretion by awarding patent infringement defendant its attorneys' fees and costs, associated with order to show cause, as sanction for plaintiff's failure to comply with court's order compelling production of documents, since plaintiff failed to timely produce documents at issue in response to various warnings by court, and failed to provide reason or explanation for its lack of production.

Particular patents — Electrical — Laser
printers

5,115,493, Jeanblanc, Hutchison, Virkus, and Johnsen, continuous laser printer for printing over page boundaries, summary judgment that patent is unenforceable vacated.

Appeal from the U.S. District Court for the Northern District of California, Orrick, J.; 40 USPQ2d 1754.

Action by DH Technology Inc., now Axiohm Transaction Solutions Inc., against Synergystex International Inc. for patent infringement. Plaintiff appeals from summary

judgment holding patent in suit unenforceable, and from imposition of sanction for failure to comply with discovery order, and defendant cross-appeals from summary judgment for plaintiff on defense of implied license, and from denial of its motion for award of attorneys' fees. Affirmed in part, vacated in part, and remanded.

Kenneth B. Wilson, Vera M. Elson, and Jennifer A. Ochs, of Wilson, Sonsini, Goodrich & Rosati, Palo Alto, Calif., for plaintiff-appellant.

Gregory B. Wood and Albert F. Davis, of Merchant, Gould, Smith, Edell, Welter & Schmidt, Los Angeles, Calif.; Jai Ho Rho, Los Angeles, for defendant cross-appellant.

Before Newman, Plager, and Schall, circuit judges.

Schall, J.

DH Technology, Inc. ("DHT") appeals from the decision of the United States District Court for the Northern District of California holding, on summary judgment in DHT's suit for patent infringement against Synergystex International, Inc. ("Synergystex"), that U.S. Patent No. 5,115,493 ("the '493 patent") is unenforceable because DHT incorrectly paid the small entity issue fee and because the statutorily-permitted time for correcting the error had passed. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, 937 F. Supp. 902, 903, 910, 40 USPQ2d 1754, 1755, 1761 (N.D. Cal. 1996).¹ DHT also appeals the district court's ruling requiring it to pay Synergystex's attorney's fees and costs associated with briefing an order to show cause, as a sanction for DHT's failure to comply with the district court's discovery order. *See id.* at 904, 40 USPQ2d at 1756-57.

Synergystex cross-appeals, challenging the district court's decision that this was not an exceptional case and that denied Synergystex's motion, made pursuant to 35 U.S.C. § 285, for attorney's fees. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, No. C-92-3307 WHO, slip op. at 1, 3 (N.D. Cal. May 28,

¹ During this appeal, DH Technology, Inc. merged with Axiohm S.A. to form Axiohm Transaction Solutions, Inc. Because all of the documentation presented to the United States Patent and Trademark Office and to the district court refers to DHT, we will, for consistency, refer to this party as DHT throughout this opinion.

1997). Synergystex also challenges the district court's decision, on summary judgment, that it did not have an implied license under the '493 patent. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, No. C-92-3307 WHO, slip op. at 1, 13-17, 21 (N.D. Cal. Nov. 28, 1995).

Because the district court erred in interpreting the law governing correction of the erroneous payment of the small entity issue fee, we vacate the grant of summary judgment of unenforceability and remand for further proceedings consistent with this opinion. We also vacate the district court's denial of exceptional case status and attorney's fees because the prevailing party, as that term is used in 35 U.S.C. § 285, has yet to be determined. However, we affirm the district court's decisions concerning the imposition of sanctions and Synergystex's lack of an implied license.

BACKGROUND

I.

On August 15, 1990, Ivan M. Jeanblanc ("Jeanblanc"), Stephen E. Hutchison, Mark K. Virkus, and Ronald J. Johnsen filed U.S. Patent Application 07/567,839 ("the '839 application"), which disclosed a continuous laser printer that can print successive forms of varying lengths. On September 21, 1990, the inventors assigned the '839 application, along with two related applications, to The Identification Business, Inc. ("IBI"). At that time, Jeanblanc owned IBI, and IBI employed all of the named inventors. That same day, Jeanblanc executed a "Verified Statement (Declaration) Claiming Small Entity Status (37 CFR 1.9(f)) — Small Business Concern," which provided:

I hereby declare that the above identified small business concern [i.e., IBI] qualifies as a small business concern as defined in 13 CFR 121.3-18, and reproduced in 37 CFR 1.9(d), for purposes of paying reduced fees under section 41(a) and (b) of Title 35, United States Code, in that the number of employees of the concern, including those of its affiliates, does not exceed 500 persons. For purposes of this statement, (1) the number of employees of the business concern is the average over the previous fiscal year of the concern of the persons employed on a full-time, part-time or temporary basis during each of the pay periods of the fiscal year, and (2) concerns are affiliates of each other when either, directly or indirectly, one concern

controls or has the power to control the other, or a third party or parties controls or has the power to control both.

I hereby declare that rights under contract or law have been conveyed to and remain with the small business concern identified above [i.e., IBI] with regard to the invention. . . .

On November 2, 1990, DHT acquired IBI. DHT manufactures and sells commercial laser printers and accessories. Pursuant to the purchase agreement, by assignment, DHT acquired the '839 application. Neither the assignment from the inventors to IBI nor the assignment from IBI to DHT was recorded in the United States Patent and Trademark Office ("PTO") at that time.

On October 18, 1991, the PTO, in connection with the '839 application, issued a "Notice of Allowance and Issue Fee Due," which provided:

HOW TO RESPOND TO THIS NOTICE:

Review the SMALL ENTITY Status shown above.

If the SMALL ENTITY is shown as YES, verify your current SMALL ENTITY status:

A. If the Status is changed, pay twice the amount of the FEE DUE shown above and notify the Patent and Trademark Office of the change in status, or

B. If the Status is the same, pay the FEE DUE shown above.

The notice showed that small entity status was claimed and that the issue fee was due by January 21, 1992. On January 10, 1992, Frank R. Agovino ("Agovino"), the attorney prosecuting the '839 application, paid the small entity issue fee (\$525) on behalf of Jeanblanc. Agovino checked the box on the "Issue Fee Transmittal" sheet stating "This application is NOT assigned." The '839 application issued as the '493 patent, entitled "CONTINUOUS LASER PRINTER FOR PRINTING OVER PAGE BOUNDARIES," on May 19, 1992.²

On August 14, 1992, Agovino sent the assignments, from the inventors to IBI and from IBI to DHT, to the PTO, with instructions to record the assignment to IBI first. The PTO recorded the assignments in the order requested, effective August 14, 1992.

II.

On August 18, 1992, DHT filed suit against Synergystex, a competitor in the con-

² The '493 patent underwent reexamination, and the patentability of all claims was confirmed on November 21, 1995.

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tinuous form laser printer market. On August 20, 1992, DHT filed an amended complaint alleging that Synergystex had willfully infringed, contributorily infringed, or induced infringement of the '493 patent. On October 9, 1992, Synergystex filed its answer, in which it denied infringement, alleged that the '493 patent was invalid and unenforceable on various grounds, and counterclaimed for declaratory judgment. On July 21, 1993, Synergystex moved for summary judgment that the '493 patent was invalid, that the patent was unenforceable due to inequitable conduct, and that it had not infringed the patent. On August 26, 1993, DHT moved for summary judgment on its infringement claims. In an April 14, 1994 opinion, the district court denied both parties' motions. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, No. C 92-3307 BAC, 1994 WL 163917, slip op. at *1, 3 (N.D. Cal. Apr. 14, 1994).

During an October 19, 1994 case management conference, Synergystex alleged, for the first time, "that the ['493] patent is invalid and unenforceable because DHT intentionally deceived the PTO by paying a small entity issue fee when DHT did not qualify as a small entity." *DH Tech.*, 937 F. Supp. at 904, 40 USPQ2d at 1756. On February 16, 1995, the parties again moved for summary judgment on the same issues that had been previously presented, with DHT additionally moving for summary judgment on Synergystex's implied license defense. Synergystex had not pled the implied license defense in its answer to the amended complaint and did not raise the defense until September 16, 1993, nearly two months after the close of discovery. *See DH Tech.*, No. C-92-3307 WHO, slip op. at 13 n.4 (Nov. 28, 1995). On February 16, 1995, Synergystex moved for summary judgment that the patent was invalid and unenforceable on the ground that DHT had fraudulently paid the small entity issue fee.

In a November 28, 1995 ruling, the district court, *inter alia*, denied Synergystex's motion for summary judgment that the '493 patent was unenforceable because DHT had fraudulently paid the small entity issue fee despite not being a small entity. *See id.* at 1, 8, 13. The court did so because it determined, as far as the point was concerned, that genuine issues of material fact existed. *See id.* at 13. The district court granted DHT's motion for summary judgment on Synergystex's implied license defense on the ground that the "evidence offered by Synergystex on this defense [was] insufficient as a matter [of] law." *Id.* at 17. The court also denied the parties' motions for summary

judgment on the infringement issue and granted summary judgment for DHT on certain of Synergystex's invalidity defenses. *See id.* at 21.

While the summary judgment motions were pending, on September 27, 1995, DHT erroneously paid the first maintenance fee for the '493 patent at the small entity rate. *See DH Tech.*, 937 F. Supp. at 904, 40 USPQ2d at 1756. DHT notified the PTO of the error on February 26, 1996. At that time, DHT corrected the erroneous underpayment and relinquished its claim of small entity status. The PTO accepted DHT's correction without issue, and this correction is not at issue in this appeal.

III.

On January 26, 1996, Synergystex filed a motion for leave to propound one additional discovery request relating to DHT's status as a small entity. Although the discovery cutoff date of July 15, 1993 had long past, the district court granted the request during a February 29, 1996 hearing. This oral ruling later was embodied in a March 5, 1996 order, which provided:

1. Defendant Synergystex is granted leave to propound a single additional discovery request upon plaintiff DHT: "Produce documents sufficient to show the number of employees of DH Technology, Inc. and its affiliates, including the full time, part time, and temporary employees, for each pay period from January 1991 to December 1995."

2. Plaintiff DHT is ordered to produce documents responsive to this request no later than 5:00 p.m., Thursday, March 7, 1996.

DH Tech., Inc. v. Synergystex Int'l, Inc., No. C-92-3307 WHO, slip op. at 3-4 (N.D. Cal. Mar. 5, 1996). In response to the discovery request, DHT did not produce documents, but instead, at approximately 5:30 p.m., on March 7, 1996, notified Synergystex that it would make its payroll records available for review at its seven locations around the world. Synergystex moved for a finding of contempt, and, in an April 8, 1996 telephonic conference, the district court noted DHT's failure to comply with its discovery order. The district court gave DHT until April 26, 1996 to comply with its order, stating:

You can comply by having the Plaintiff send photocopies of the relevant personnel records to counsel by overnight mail for Friday delivery with the Defendant bearing the copying cost and delivery cost.

Or you can provide the Defendant with affidavits attesting to the exact number of

expires, while unintentional delays in payment of an increase in the issue fee could only be corrected within a year and three months of receiving notice of the increase. The Court, thus, finds that § 1.28(c) must be read in conjunction with the deadlines set forth in § 1.317 for correcting the payment of an insufficient issue fee. Pursuant to § 1.317(c), a good-faith error in claiming small entity status, and in paying a small entity issue fee, must be corrected no later than one year and three months after the date of the notice of allowance, or within three months of the PTO's denial of a timely petition to accept late payment due to unavoidable delay.

Id. at 909, 40 USPQ2d at 1761. The district court concluded that the '493 patent lapsed on January 21, 1992, that the lapse could not be corrected after January 21, 1993 (one year and three months after the October 18, 1991 notice of allowance), and that "the '493 patent was essentially stillborn." *Id.* at 910, 40 USPQ2d at 1761. The district court denied DHT's motion for reconsideration or to amend the judgment. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, No. C-92-3307 WHO (Nov. 15, 1996), *vacated and amended by*, No. C-92-3307 WHO (N.D. Cal. Jan. 17, 1997).

IV.

Meanwhile, on August 2, 1996, while the case was pending before the district court, DHT filed a "Notification of Error in Payment of Issue Fee as a Small Entity" with the PTO. In so doing, DHT withdrew its small entity status and stated that small entity status "may have been claimed erroneously when the issue fee was paid on January 10, 1992." DHT resubmitted this filing on August 9, 1996, via facsimile, at the request of the PTO's Office of Petitions. On appeal, DHT claims to have had no knowledge of the district court's August 7 ruling at the time it filed these submissions. The PTO accepted the payment of the fee deficiency on November 8, 1996, citing 37 C.F.R. § 1.28(c). After learning of the district court's August 7 decision, however, the PTO vacated its ruling and held further action in abeyance pending further court action.³

³ While the district court in this case concluded that correction of the erroneous payment of the small entity issue fee must satisfy the requirements of 37 C.F.R. § 1.317, *see DH Tech.*, 937 F. Supp. at 909, 40 USPQ2d at 1761, the court in *Jewish Hospital v. Idexx Laboratories*, 951 F. Supp. 1, 2 [42 USPQ2d 1720] (D. Me. 1996), held that correction was governed solely by 37 C.F.R. § 1.28(c). Given this conflict, the PTO is holding all issue fee correction submissions in

V.

In a March 28, 1997 opinion, the district court denied Synergystex's motion, made pursuant to 35 U.S.C. § 285, for attorney's fees. *See DH Tech.*, No. C-92-3307 WHO, slip op. at 1 (May 28, 1997). The district court stated that it had not ruled in its earlier opinions "on the issues of intent to defraud, bad faith, or inequitable conduct" and that Synergystex had not made a clear and convincing showing to justify an award of fees. *Id.* at 3. In a September 26, 1997 opinion, the district court awarded Synergystex attorney's fees and costs incurred in briefing the order to show cause and statutory costs as a prevailing party. *See DH Tech., Inc. v. Synergystex Int'l, Inc.*, No. C-92-3307 WHO (N.D. Cal. Sept. 26, 1997).

As noted, both parties appeal various aspects of the district court's decisions. We have jurisdiction pursuant to 28 U.S.C. § 1295 (a)(1).

DISCUSSION

I.

Summary judgment is proper in a case where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P.* 56(c). We review the district court's grant of summary judgment *de novo*. *See Aktiebolag v. E.J. Co.*, 121 F.3d 669, 672, 43 USPQ2d 1620, 1622 (Fed. Cir. 1997) (citing *Conroy v. Reebok Int'l, Ltd.*, 14 F.3d 1570, 1575, 29 USPQ2d 1373, 1377 (Fed. Cir. 1994)); *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 528, 41 USPQ2d 1001, 1004 (Fed. Cir. 1996).

II.

The statutory system of patent fees allows a qualifying small business concern, independent inventor, or nonprofit organization to pay half of the standard issue fee. *See* 35 U.S.C. § 41(a)(2), (h)(1) (1994). A party qualifying for the reduced fees is referred to

abeyance pending resolution of this appeal. *See* U.S. Patent and Trademark Office, 1198 *Official Gazette* 27 (May 6, 1997). The PTO has not expressed its view on whether 37 C.F.R. § 1.28(c), 37 C.F.R. § 1.317, or both govern the timing of correction. *See Changes to Patent Practice and Procedures*, 62 Fed. Reg. 53132, 53135 (Oct. 10, 1997).

as a "small entity." See 37 C.F.R. § 1.9(f) (1997). The regulations define a small business concern "as one whose number of employees, including those of its affiliates, does not exceed 500 persons." 37 C.F.R. § 1.9(d) (1997); see *Manual of Patent Examining Procedure* § 509.02 (6th ed. 1997) ("MPEP") (detailing the criteria necessary to establish small entity status). "The number of employees of a business concern is determined by averaging the number of persons of the concern and its affiliates employed on a full-time, part-time, or temporary basis during each of the pay periods for the preceding completed twelve (12) calendar months." MPEP § 509.02.

An applicant establishes small entity status by filing a verified statement, averring "that the concern qualifies as a small business concern," with the PTO. 37 C.F.R. § 1.27(c) (1997); see 37 C.F.R. § 1.27(a) (1997); MPEP § 509.03. It is undisputed that DHT claimed small entity status and paid the small entity issue fee, despite, at the relevant time, exceeding the maximum number of employees permitted to qualify as a small business concern. See *DH Tech.*, 937 F. Supp. at 905-06, 40 USPQ2d 1757-58 (explaining that DHT had an average of over 500 employees in 1991, the year prior to payment of the issue fee).

Given DHT's error, we must address which statutory and regulatory provisions govern the correction of the erroneous payment of the small entity issue fee, a question of first impression. Statutory interpretation is a question of law, which we review *de novo*. See *In re Portola Packaging, Inc.*, 110 F.3d 786, 788, 42 USPQ2d 1295, 1297 (Fed. Cir. 1997); *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543, 1549, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996). On appeal, DHT argues that correction of the erroneous payment of the small entity issue fee is governed exclusively by 37 C.F.R. § 1.28(c) and that 35 U.S.C. § 151 and 37 C.F.R. § 1.317 are inapplicable to the facts of this case. For its part, Synergystex contends that the district court properly determined that the '493 patent lapsed under 35 U.S.C. § 151 for failure to pay the standard issue fee. Synergystex argues that the time for correcting an underpayment of the issue fee is governed exclusively by 37 C.F.R. § 1.317(c) and that because DHT failed to correct the underpayment within the permitted time, it cannot now correct the error. Synergystex asserts that 37 C.F.R. § 1.28(c) does not increase the time for correction specified in 37 C.F.R. § 1.317(c).

The district court concluded that the '493 patent had lapsed pursuant to 35 U.S.C. §

151. See *DH Tech.*, 937 F. Supp. at 907, 40 USPQ2d at 1759. Section 151 provides:

If it appears that applicant is entitled to a patent under the law, a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee or a portion thereof, which shall be paid within three months thereafter.

Upon payment of this sum the patent shall issue, but if payment is not timely made, the application shall be regarded as abandoned.

Any remaining balance of the issue fee shall be paid within three months from the sending of a notice thereof, and if not paid, the patent shall lapse at the termination of this three-month period. . . .

If any payment required by this section is not timely made, but is submitted with the fee for delayed payment and the delay in payment is shown to have been unavoidable, it may be accepted by the Commissioner as though no abandonment or lapse ever occurred.

35 U.S.C. § 151 (1994). The district court determined that although 37 C.F.R. § 1.28(c) permits correction of the erroneous payment of the small entity issue fee at any time, see *DH Tech.*, 937 F. Supp. at 907-08, 40 USPQ2d at 1759, section 1.317 of 37 C.F.R. limits the time for correction to a year and three months after the date of the notice of allowance, see *DH Tech.*, 937 F. Supp. at 909, 40 USPQ2d at 1761. Section 1.28(c) of 37 C.F.R. provides:

If status as a small entity is established in good faith, and fees as a small entity are paid in good faith, in any application or patent, and it is later discovered that such status as a small entity was established in error or that through error the Patent and Trademark Office was not notified of a change in status . . . the error will be excused (1) if any deficiency between the amount paid and the amount due is paid within three months after the date the error occurred or (2) if any deficiency between the amount paid and the amount due is paid more than three months after the date the error occurred and the payment is accompanied by a statement explaining how the error in good faith occurred and how and when the error was discovered. . . .

37 C.F.R. § 1.28(c) (1997).⁴ Section 1.317 of 37 C.F.R. provides:

⁴ The PTO amended the regulations, effective December 1, 1997. Section 1.28(c) of 37 C.F.R. remained substantively unchanged. Under the new regulation, a party need not submit a state-

(a) If the specified in higher amount issue fee is the issue fee for months for and, if not for termination.

(b) The payment of issue fee late mailing of lapse had the delay been unavoidable the delay filed after otherwise.

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⁵ In the subsection rated into *Patent Practice* 53157, 53 1.137(a) tion 1.137 id. at 531

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(a) If the issue fee paid is the amount specified in the Notice of Allowance, but a higher amount is required at the time the issue fee is paid, any remaining balance of the issue fee is to be paid within three months from the date of notice thereof and, if not paid, the patent will lapse at the termination of the three-month period.

(b) The Commissioner may accept the payment of the remaining balance of the issue fee later than three months after the mailing of the notice thereof as though no lapse had ever occurred if upon petition the delay in payment is shown to have been unavoidable. The petition to accept the delayed payment must be promptly filed after the applicant is notified of, or otherwise becomes aware of, the lapse.

(c) The Commissioner may, upon petition, accept the payment of the remaining balance of the issue fee later than three months after the mailing of the notice thereof as though no lapse had ever occurred if the delay in payment was unintentional. The petition must be:

(4) Filed either:

(i) Within one year of the date on which the patent lapsed; or

(ii) Within three months of the date of the first decision on a petition under paragraph (b) of this section which was filed within one year of the date on which the patent lapsed.

37 C.F.R. § 1.317 (1997).³

We begin our analysis with 35 U.S.C. § 151, the statutory provision governing payment of the issue fee. Pursuant to 35 U.S.C. § 151, ¶ 2, failure to pay the issue fee specified in the notice of allowance within three months of the mailing of that notice results in abandonment of the application. DHT paid the issue fee specified in the notice of allowance, albeit reduced on the basis of its claimed small entity status. See *DH Tech.*, 937 F. Supp. at 903-04, 40

ment explaining how the error occurred and when the error was discovered. Submission of the fee deficiency will be treated as a representation that small entity status was established in good faith and small entity fees were paid in good faith. See *Changes to Patent Practice and Procedures*, 62 Fed. Reg. at 53135, 53184.

³In the revised regulations, the substance of subsections b and c of § 1.317 have been incorporated into 37 C.F.R. § 1.137. See *Changes to Patent Practice and Procedures*, 62 Fed. Reg. at 53157, 53171, 53194-95, 53198. The new section 1.137(a) addresses unavoidable delays, and section 1.137(b) addresses unintentional delays. See *id.* at 53194-95.

USPQ2d at 1756. Therefore, the application was not abandoned pursuant to 35 U.S.C. § 151, ¶ 2.

The statute further provides that any balance of the issue fee due shall be paid within three months of "the sending of a notice thereof" or the patent shall lapse. 35 U.S.C. § 151, ¶ 3 (1994). This provision reflects a prior scheme under which the issue fee was collected in two installments, a base fee payable before the patent issued and a balance of the issue fee due payable within three months of the issue date. See *Ex parte Crissy, Spano, and Wolff*, 201 USPQ 689, 692 (Patent and Trademark Office Bd. of Appeals 1976); *In re Turner*, 3 USPQ2d 1214, 1217, 1221 (U.S. Dept. of Commerce Office of Admin. Law Judge 1985, 1986) (detailing the lapse of a patent because the balance of issue fee due was not timely paid). The two-installment scheme allowed for an exact calculation of the issue fee, which at that time depended on the number of pages printed and the number of drawing sheets. See *Ex parte Crissy*, 201 USPQ at 692. The lapse provision of 35 U.S.C. § 151, ¶ 3 is no longer relevant to the two-installment issue fee payment scheme, which was eliminated on October 1, 1982. See *Changes In Procedures for Revival of Patent Applications and Reinstatement of Patents*, 58 Fed. Reg. 44277, 44278 (Aug. 20, 1993) (hereinafter "Changes In Procedures") (explaining that subsequent to October 1, 1982 all applicants were required to pay the same issue fee regardless of the size of the specification and drawings, thereby replacing the two-installment issue fee scheme).

The statutory lapse provision of 35 U.S.C. § 151, ¶ 3 also applies when a fee increase takes effect after the mailing of the notice of allowance but prior to payment of the issue fee. See *In re Mills*, 12 USPQ2d 1847, 1848 (U.S. Patent and Trademark Office Comm'r of Patents and Trademarks 1989). The PTO adopted a policy to address this situation under 35 U.S.C. § 151, ¶ 3:

The policy of the [PTO] will be that if the fee specified on the Notice of Allowance and Issue Fee Due is paid by the due date the application will not be regarded as abandoned. Applicant will be sent a notice of balance of issue fee due and given three months to pay the remainder of the issue fee. The patent will lapse if the balance of the issue fee is not paid within the allotted three months.

In re Mills, 12 USPQ2d at 1848. Section 151, ¶ 3 of Title 35 thus remains relevant to the situation in which a fee increase takes

effect after the mailing of the notice of allowance but prior to payment of the issue fee. *See Changes In Procedures*, 58 Fed. Reg. 44278.

The Commissioner may accept late payment of the remaining balance of the issue fee due when the delay in payment was unavoidable. *See* 35 U.S.C. § 151, ¶ 4 (1994); 37 C.F.R. § 1.317(b) (1997).⁶ DHT does not challenge the district court's holding that its delay in correcting the underpayment of the issue fee was not unavoidable. *See DH Tech.*, 937 F. Supp. at 907, 40 USPQ2d at 1759. Therefore, 35 U.S.C. § 151, ¶ 4 and 37 C.F.R. § 1.317(b) do not apply to the facts of this case. The regulations further allow the Commissioner to accept the remaining balance of the issue fee due if the delay in payment was unintentional and a petition to allow late payment is filed within one year of the date on which the patent lapsed, i.e., within a year and three months of the notice of balance of issue fee due. *See* 37 C.F.R. § 1.317(c) (1997).⁷ The PTO has interpreted this regulation, and the lapse provision of 35 U.S.C. § 151, ¶ 3, as applying in the situation where a fee increase occurs after the mailing of the notice of allowance. *See Changes In Procedures*, 58 Fed. Reg. at 44278; *Changes to Patent Practice and Procedures*, 62 Fed. Reg. 53132, 53157 (Oct. 10, 1997) (explaining how the new § 1.317, which incorporates the substance of § 1.317(c) (1997), applies to such a situation).

While we agree that 35 U.S.C. § 151, ¶ 3, and 37 C.F.R. § 1.317(c) apply in a case where a fee increase occurs after the mailing

of the notice of allowance but prior to payment of the issue fee, we find no support for applying these provisions to the erroneous payment of the small entity issue fee. In fact, neither provision mentions small entity status. Before a patent lapses, pursuant to 35 U.S.C. § 151, ¶ 3, for failure to pay the balance of issue fee due, the PTO mails a notice of balance of issue fee due to the patentee. *See* 35 U.S.C. § 151, ¶ 3; *In re Mills*, 12 USPQ2d at 1848; *Changes In Procedures*, 58 Fed. Reg. 44278; *Changes to Patent Practice and Procedures*, 62 Fed. Reg. at 53157. Since the PTO does not police or verify entitlement to claim small entity status, *see MPEP* § 509.03; U.S. Patent and Trademark Office, 1098 *Official Gazette* 502-03 (Jan. 3, 1989), the PTO would not be aware that an applicant, who had erroneously claimed small entity status and paid the small entity issue fee, had a balance of issue fee due. Therefore, the PTO would be unable to send the notice of balance of issue fee due pursuant to 35 U.S.C. § 151, ¶ 3. This supports the conclusion that 35 U.S.C. § 151 and 37 C.F.R. § 1.317 do not apply to the erroneous payment of the small entity issue fee.

[1] Unlike 35 U.S.C. § 151 and 37 C.F.R. § 1.317, section 1.28 of 37 C.F.R., entitled "Effect on fees of failure to establish status, or change status, as a small entity," specifically addresses the correction of an erroneous claim of small entity status and the erroneous payment of the small entity issue fee. Section 1.28(c)(2) of 37 C.F.R. permits a patentee to correct the erroneous payment of the small entity issue fee at any time, provided the "payment [of the amount owing] is accompanied by a statement explaining how the error in good faith occurred and how and when the error was discovered."⁸ We hold that this regulation is the sole provision governing the time for correction of the erroneous payment of the issue fee as a small entity. *See Jewish Hosp. v. Idexx Lab.*, 951 F. Supp. 1, 2 (D. Me. 1996) (holding that 37 C.F.R. § 1.28(c) governs correction of an erroneous claim of small entity status and the erroneous payment of the small entity issue fee). Our decision is consistent with current patent practice:

⁸ The amended version of § 1.28(c) does not require such a statement. Instead, a fee deficiency statement submitted under this provision will be treated as a representation by the party that small entity status was established in good faith and small entity fees were paid in good faith. *See Changes to Patent Practice and Procedures*, 62 Fed. Reg. at 53135.

⁶ The explanation accompanying the new regulations states that the new § 1.317(a) governs the late payment of a balance of issue fee due, which can occur when a fee increase takes effect after the mailing of the notice of allowance but prior to payment by the applicant, when the delay in payment was unavoidable. *See Changes to Patent Practice and Procedure*, 62 Fed. Reg. at 53157. In the new regulations § 1.317(a) replaces the former § 1.317(b). *See id.* at 53157-58, 53194-95.

⁷ In the new regulations, § 1.317(b) governs acceptance of late payment where the delay was unintentional. *See Changes to Patent Practice and Procedures*, 62 Fed. Reg. at 53157-58, 53195. The requirement that a petition to accept late payment of the balance of issue fee due be filed within one year of the date on which the patent lapsed, contained in 37 C.F.R. § 1.317(c)(4) (1997), has been deleted in the new regulations. *See id.* at 53158. However, the applicant must show that the entire delay, from the time payment was due until the PTO grants a petition to accept late payment, was unintentional. *See id.* at 53195 (new § 1.317(b)(3)).

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37 CFR 1.28 also provides guidance as to the effect of improperly establishing status as small entity. . . .

When small entity status has been established in error and small entity fees have been paid in error, the matter is to be addressed under 37 CFR 1.28(c).

MPEP § 509.03. Because we conclude that the timing of correction of the erroneous payment of the small entity issue fee is governed exclusively by 37 C.F.R. § 1.28(c), the district court erred in its determination that the '493 patent had lapsed pursuant to 35 U.S.C. § 151 and could not be revived because 37 C.F.R. § 1.317 limited the time during which the error could be corrected.

While 37 C.F.R. § 1.28(c) governs the correction of the erroneous payment of the small entity issue fee and does not limit the time during which such an error may be corrected, the regulation does provide meaningful limits on the circumstances in which correction is permissible. A patentee may correct the erroneous payment of the small entity issue fee "[i]f status as a small entity is established in good faith" and the small entity issue fee was "paid in good faith." 37 C.F.R. § 1.28(c) (1997). The regulation additionally provides:

(d)(1) Any attempt to fraudulently (i) establish status as a small entity or (ii) pay fees as a small entity shall be considered as a fraud practiced or attempted on the Office.

(2) Improperly and with intent to deceive

(i) Establishing status as a small entity, or

(ii) Paying fees as a small entity shall be considered as a fraud practiced or attempted on the Office.

37 C.F.R. § 1.28(d) (1997); see *MPEP* § 509.03. These regulations permit correction of honest mistakes, but prevent attempts to fraudulently pay the small entity issue fee while maintaining an enforceable patent. As aptly stated by the district court:

Presumably, a small company with fewer than 500 employees will not be overly burdened in calculating an exact count of its employees for the appropriate period before claiming small entity status. Where the cost exceeds the discount in the issue fee granted to small entities, the applicant is free to pay the full issue fee. *Indeed, where there is the slightest doubt about an applicant's entitlement to claim small entity status, the applicant would be foolish not to pay the full issue fee.*

DH Tech., 937 F. Supp. at 909-10, 40 USPQ2d at 1761 (emphasis added); see *Changes to Patent Practice and Procedure*,

62 Fed. Reg. at 53135 ("Nevertheless, an applicant or patentee can avoid undesirable results by not claiming small entity status unless it is absolutely certain that the applicant or patentee is entitled to small entity status (*i.e.*, resolving any doubt, uncertainty, or lack of information in favor of payment of the full fee).").

The district court specifically noted that it was not addressing DHT's intent in reaching its decision. See *DH Tech.*, 937 F. Supp. at 903, 908, 910, 40 USPQ2d at 1755, 1759, 1761. On remand the district court should assess whether DHT acted in "good faith," *i.e.*, whether DHT fraudulently established status as a small entity or fraudulently paid the small entity issue fee. See 37 C.F.R. §§ 1.28(c), (d) (1997). We express no opinion on this issue; rather we leave the issue to be addressed by the district court in the first instance.

III.

As noted above, the district court ordered DHT to pay Synergystex's attorney's fees and costs associated with the order to show cause as a sanction for failing to comply with the court's order compelling the production of documents related to DHT's entitlement to claim small entity status. See *DH Tech.*, 937 F. Supp. at 904, 40 USPQ2d at 1756-57. On appeal, DHT argues that it complied with the district court's discovery order and that the award of attorney's fees and costs was unjustified. Synergystex responds that the district court's order required actual delivery of the documents at issue and that DHT repeatedly failed to produce the documents. Synergystex also argues that, given DHT's repeated failure to comply with the district court's order, the court did not abuse its discretion in sanctioning DHT.

We review procedural matters not unique to patent law under the law of the regional circuit court where appeals from the district court would normally lie. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75, 223 USPQ 465, 472 (Fed. Cir. 1984). Therefore, we review Rule 37 sanctions under an abuse of discretion standard. See *Refac Int'l. Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1253-54, 16 USPQ2d 1347, 1352 (Fed. Cir. 1990) (citing *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 379 (9th Cir. 1988)); *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). "The district court's discretion will not be disturbed unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached." *Payne*, 121 F.3d at 507.

[2] Rule 37(b)(2) permits the court to order a party to pay the reasonable expenses, including attorney's fees, caused by that party's failure to comply with the court's discovery order. *See* Fed. R. Civ. P. 37(b)(2). While acknowledging that DHT had expended "great effort" to comply with the court's discovery order relating to the production of documents showing the number of employees at DHT during the relevant periods, the district court noted that DHT had failed to explain at the time of production why several of the most important documents were missing. *See DH Tech.*, 937 F. Supp. at 905, 40 USPQ2d at 1756-57. The district court concluded that DHT had failed to fully comply with its discovery order and therefore sanctioned DHT pursuant to Rule 37(b)(2). *See id.* In view of DHT's failure to timely produce the documents at issue in response to various warnings by the court, and in view of DHT's failure to provide a reason or explanation for its lack of production, we cannot say that the district court abused its discretion in awarding attorney's fees and costs expended in briefing the order to show cause. *See Payne*, 121 F.3d at 507 ("A district court's finding that one of its orders was violated is entitled to considerable weight because a district judge is best equipped to assess the circumstances of the non-compliance." (internal quotations and citation omitted)); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980) (the sanction of awarding attorney's fees and costs is the least harsh of the sanctions available under Rule 37(b)(2)). DHT's belated compliance with the court's order does not negate the imposition of sanctions. *See Payne*, 121 F.3d at 508.

IV.

Finally, we turn to the two issues raised by Synergystex in its cross-appeal. First, Synergystex argues that the district court erred in granting summary judgment on its implied license defense. *See DH Tech.*, No. C-92-3307 WHO, slip op. at 17 (Nov. 28, 1995). DHT argues that the district court properly granted summary judgment on the undisputed facts. In its amended complaint, filed August 20, 1992, DHT included the following statement, "The activities of Synergystex have been without express or implied license by DH Technology." In answering this statement, Synergystex responded:

Defendant admits that there is no express or implied license with respect to the '493 patent but denies that such a license is required under the '493 patent to enable

defendant to lawfully make, use and sell its products.

While the district court addressed the merits of Synergystex's implied license defense, the court noted that "Synergystex did not plead this license defense in its answer, and failed to formally raise the defense until September 16, 1993, nearly two months after the close of discovery." *Id.* at 13. In any event, we have carefully considered the implied license issue. Having done so, we see no reason to disturb the district court's grant of summary judgment.

Synergystex also challenges the district court's decision that this was not an exceptional case under 35 U.S.C. § 285. *See DH Tech.*, No. C-92-3307 WHO, slip op. at 1, 3 (May 28, 1997). Section 285 of title 35 provides, "The court in exceptional cases may award reasonable attorney fees to the prevailing party." *See Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1480, 45 USPQ2d 1498, 1504 (Fed. Cir. 1998) (detailing the requirements for an award of attorney's fees under section 285). Because the case is not yet complete, any analysis of exceptional case status would be premature. We need not address Synergystex's claim given our reversal of the district court's decision on the correction of the erroneous payment of the small entity issue fee. Because the case has not yet been resolved and the prevailing party has not yet been determined, we necessarily vacate the district court's decision regarding exceptional case status. Synergystex may renew its claim for attorney's fees under 35 U.S.C. § 285 at the close of the proceedings, should it be the "prevailing party" as that term is used in the statute.

CONCLUSION

For the foregoing reasons, we vacate the district court's decision that the '493 patent lapsed because of the erroneous payment of the small entity issue fee and could not be revived because the time during which this error could be corrected had passed. We hold that the timing of correction of the erroneous payment of the small entity issue fee is governed solely by 37 C.F.R. § 1.28(c), not 35 U.S.C. § 151 and 37 C.F.R. § 1.317. We remand for the district court to consider the arguments of the parties under the correct legal standard and to consider whether DHT met the other criteria, specified in 37 C.F.R. §§ 1.28(c), (d), for correcting the error. We also vacate the district court's decision on exceptional case status because the issue cannot be addressed until there is a prevailing party. Because the district court did not

err in sanctioning discovery the court's decision did not imply license, we affirm.

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err in sanctioning DHT for its conduct during discovery and for failing to comply with the court's discovery orders, and because the court did not err in denying Synergystex's implied license defense on summary judgment, we affirm those rulings.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

U.S. Patent and Trademark Office Trademark Trial and Appeal Board

Institut National Des Appellations d'Origine
v. Brown-Forman Corp.

Opposition No. 97,417

Decided May 29, 1998

Released June 2, 1998

TRADEMARKS AND UNFAIR TRADE PRACTICES

1. Types of marks — Certification marks (§327.11)

Geographic designation that is controlled and limited in such manner that it reliably indicates to purchasers that goods bearing this designation come exclusively from particular region; functions as regional certification mark; regional certification mark functions as indication of regional source, and does not thereby become name of genus of goods comprised of goods produced in that region.

2. Types of marks — Certification marks (§327.11)

Relevant issue in determining whether designation is protectible regional certification mark is whether public understands that goods bearing mark come only from region named in mark, and not whether public is expressly aware of certification function of mark, or of certification process underlying use of mark; there is no requirement that purchasers be expressly aware of term's certification function per se.

3. Types of marks — Certification marks (§327.11)

Regional certification mark will not be become generic term as applied to particular goods unless it has lost its significance as

indication of regional origin for those goods by virtue of its having been used on goods which originate somewhere other than place named in mark.

4. Types of marks — Certification marks (§327.11)

"Cognac" is valid common law regional certification mark, rather than generic term, since purchasers in U.S. primarily understand "Cognac" designation to refer to brandy originating in Cognac region of France, and not to brandy produced elsewhere, and since opposers control and limit use of designation to brandy which meets certain standards of regional origin.

5. Registration and its effects — Non-registrable subject matter — Confusing (§315.0405)

Types of marks — Certification marks (§327.11)

Applicant is entitled to summary judgment on opposers' claim that registration for applicant's "Canadian Mist and Cognac" mark, which incorporates "Cognac" certification mark, should be refused under Lanham Act's Section 2(a), since issue in Section 2(a) cases involving certification marks is whether there is false suggestion of connection with owner of certification mark, since, to extent opposers are contending that mark is name or identity of growers, producers, and merchants of Cognac brandy, that contention is admission that applicant's mark does not point uniquely and unmistakably to opposers, and since opposers themselves are two separate entities, and it is unclear how it is possible for challenged mark to point uniquely and unmistakably to both.

6. Types of marks — Certification marks (§327.11)

Infringement; conflicts between marks — Tests generally (§335.06)

Likelihood of confusion analysis applied to certification marks under Lanham Act's Section 2(d) is not different and more limited than that applied in cases where mark at issue is trademark or service mark; since there is no support in language of statute for application of different analyses, and since precedent does not hold that likelihood of confusion analysis, in context of marks which are similar to previously-used certification marks, is limited to determination of whether challenged mark is "deceptive," that is, whether it accurately describes user's goods.

U.S. DEPARTMENT OF COMMERCE
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MAINTENANCE FEE TRANSMITTAL FORM

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Enclosed herewith is the payment of the maintenance fee(s) for the listed patent(s).

1. ☒ A check for the amount of \$ 675.00 for the full payment of the maintenance fee(s) and any necessary surcharge on the following patents is enclosed.
2. ☐ The Commissioner is hereby authorized to charge \$ _____ to cover the payment of the fee(s) indicated below to Deposit Account No. _____.
3. ☒ The Commissioner is hereby authorized to charge any deficiency in the payment of the required fee(s) or credit any overpayment to Deposit Account No. 06-1358.

*Information required by 37 CFR 1.366(c)(columns 1 & 5). Information requested under 37 CFR 1.366(d) (columns 2-4 & 6-9)

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2	<u>4,407,288</u>	170	\$225.00		243,801 ✓	10/4/83	3/16/81	4	YES
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